

STATE OF MICHIGAN
COURT OF APPEALS

In re C. SWINDLE, Minor.

UNPUBLISHED
March 19, 2015

No. 323321
Kalamazoo Circuit Court
Family Division
LC No. 2012-000037-NA

Before: M. J. KELLY, P.J., and MURPHY and HOEKSTRA, JJ.

PER CURIAM.

Respondent mother appeals by right the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

In February 2012, the Department of Human Services petitioned the trial court to remove the minor child, who was then four years of age, from respondent's care. The Department alleged that respondent had overdosed on cocaine and alcohol in an effort to commit suicide in October 2011 and had called the Department in January 2012 to report that she continued to use cocaine. It further alleged that respondent's drug addiction was such that she could not adequately care for the child. At a hearing held that same month, respondent's lawyer stipulated to authorizing the petition and the trial court placed the child with his adult half-sister, NS.

The trial court held an adjudication trial in March 2012. At the trial, respondent admitted the basic facts and agreed that she "has [a] drug addiction which does not allow her to adequately take care of the child." The trial court accepted the plea and took jurisdiction over the child. The court continued the child's placement with NS.

The trial court held dispositional hearings in April, June, and September 2012. Respondent did not show for the hearings and the evidence showed that she was not complying with the case service plan or making any progress.

At the April hearing, the Department's representative, Dan Blankenship, testified that respondent had not begun to comply with the drug screening program. He explained that he was unable to get in contact with respondent, that she had not shown for any of the scheduled appointments, and had stopped answering her phone. NS also testified at the April hearing and

stated that she informed her mother about the child's medical issues and appointments, but she never showed up.

Blankenship testified that respondent still had not made a single call to the drug testing agency by the time of the June hearing. She twice had been offered admittance to a drug treatment program in Grand Rapids, but did not show up. She also did not enter a local treatment program that was offered to her. Blankenship stated that respondent had also not complied with her psychiatric treatment—her last appointment was in February. According to the author of the report from that visit, respondent told the psychiatrist that she “wants to hurt her baby,” “has had suicidal and homicidal thoughts,” and continues to have hallucinations, “which may be related to substance abuse.” Blankenship informed the court that respondent called and asked him to drive her to the jail to turn herself in on outstanding warrants.

At the September hearing, a new caseworker, Sarah Grider, testified that respondent had shown some recent progress. Although respondent had not complied with her drug screening regimen throughout August, she had been complying over the past ten days. Respondent also reported to Grider that she was attending AA and NA meetings, looking for a job, and cooperating with her mental health agency. Grider agreed that respondent seemed to be trying to turn things around starting in September, but stated that respondent was also facing charges for retail fraud.

At the close of the September hearing, the trial court acknowledged that respondent had shown some compliance over the past ten days, but nevertheless found that she had not made progress on her case service plan. The court stated that it wanted to see more compliance and wanted verifiable evidence that she was benefiting from the services.

The trial court held a permanency planning hearing in December 2012. Respondent participated by interactive video. At the hearing, Grider testified that respondent called her in October 2012 and admitted to having a “relapse.” She further stated that respondent had been sentenced to serve 12 to 90 months in prison for retail fraud. The court found that there had been little compliance with the case service plan and ordered the goal to be changed from reunification to adoption.

The trial court held new review hearings in March and June 2013. There was evidence at each hearing that respondent had significantly improved her participation in the case service plan. At the June hearing, Grider testified that respondent had “gone above and beyond the programs that she's been asked to complete.” She had taken a parenting class, had completed phase one of the prison's substance abuse program, was working, and had enrolled in mental health counselling. Despite this progress, Grider recommended that the goal remain adoption. She explained that respondent did not comply with the plan before she was incarcerated and she was concerned that respondent would return to “her old ways” once released. She also felt that the child, who had since turned five, had been in the system too long and needed stability and permanence. Respondent also testified at the June hearing and related that she was going to be paroled in November 2013. She discussed the services that she had received in prison and said she had benefited from and would continue the services after her release.

In July 2013, the Department petitioned for the termination of respondent's parental rights under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).

The trial court held another review hearing in September 2013. At the hearing, there was testimony and evidence that respondent continued to show progress on her case service plan.

The trial court held a termination hearing later that same month. Blankenship testified that respondent had admitted she was addicted to cocaine, but refused to participate in drug screening until her incarceration. When first incarcerated in June 2012, respondent told him that it was "the first time in years that she's actually been clean" Blankenship said respondent has a long criminal history and was arrested for shoplifting while she had a child in her care. During the time he interacted with her, respondent did not have stable housing and struggled with using "substances in the presence of her child." She also did not have gainful employment, but did receive disability benefits related to her mental condition.

Grider also testified and described how respondent had improved her compliance with the case service plan after her incarceration. Grider worried that respondent had returned to drugs after incarceration in the past and might do so again: "I'm just concerned that, you know, now that she will be released from prison and going to her—I guess old people, places, and things, I just want to make sure that there is not going to be any triggers or anything like that to make her use again."

Respondent testified at the termination hearing and conceded that she had a "serious" drug issue, but felt that it was not too serious: "It was serious, but I wouldn't say it was so serious to where I couldn't take care of my son." She related that she would continue to avail herself of services even after her release. She agreed that she had made some bad choices, but felt that things were now different: "I am a better person. I want to be clean. I am clean. I will continue to be clean."

On cross-examination, respondent admitted that her son was born in a correctional facility. She also denied having tried to commit suicide by overdosing; she was "crying out for help" but could not get it "on the streets." She explained that she went to "mental health" and "protective services", but they did not provide her with help—with "resources"—they just left her on her own. As for the time she was caught shoplifting with a child, that incident was not her fault. She had asked the child's parent to "leave those kids, but she wouldn't." The parent would not listen and she could not "control what other people do." And, in any event, the child involved was not her own or one of her grandkids.

Respondent admitted that her "stints" in prison were related to her need to "support a drug habit." But, she testified, this time was different because she availed herself of the prison's programs, which she had not previously done. Although she said she participated in raising her first daughter, she also stated that she went to NS' paternal grandmother and asked her to help raise NS because respondent was "living the street life" and could not take care of the child at the time. The paternal grandmother also helped raise her two other daughters. The second oldest was in prison for her part on the "bowling alley murder" and the other daughter was "somewhere out here, you know, taking care of her kids and her business"

Respondent's adult daughter, NS, testified and said her mom had made "so many bad decisions" while she was growing up and ended up incarcerated. It was then that she would get clean and stop using for a while. She would, however, go right back to the drugs after her release. NS agreed that it was a pattern that her mother repeated over and over again.

After the close of proofs, the trial court found that the Department had established statutory grounds for terminating the parental rights of the child's unknown father. It further opined that—were the burden of proof a preponderance of the evidence—the Department would have met its burden. The court expressed doubt about respondent's ability to be successful outside of prison; it explained that respondent was dishonest with regard to certain things, minimized her "past behavior", and had been involved with criminal lifestyle and drugs for the majority, "if not all of her adult life." Nevertheless, the court stated, it was a close case and, because respondent had on paper done everything she was supposed to do, it would give her the benefit of the doubt. For that reason, it determined that the Department had not met its burden of proof under the clear and convincing evidence standard.

The trial court denied the petition to terminate respondent's parental rights to the child and continued the case service plan. The court, however, warned respondent that she should not return to her previous lifestyle: if "you're released and you go back to that lifestyle, drinking, not taking your medication, and/or drugs, the next day or within a week, they're gonna be filing a petition, and it's gonna be right back in front of me. . . . [A]nd I'm gonna terminate your rights to your son."

The trial court held hearings concerning the child's housing and placement in October, November, and December 2013. NS apparently was not making her rent payments and there were concerns that the child should no longer be placed with her. The trial court then placed the child with respondent's husband on the understanding that respondent appeared to be doing well and that her husband would follow the Department's directives.

The trial court held a permanency planning hearing later that same month. At the hearing, a worker from the Department updated the court on respondent's progress since her release from prison in November. She testified that respondent had complied with the drug screening program and had negative screens. Respondent was also attending AA and NA meetings and attending supervised parenting, which was going well. The trial court accordingly ordered the continuation of services and the current placement.

The trial court conducted another review hearing on March 17, 2014. At the hearing, Grider testified that respondent was still complying with the drug screen program and all her screens were negative. Grider also testified about respondent's efforts to participate in various services and stated that respondent had been "fully compliant with her parole expectations also." The trial court stated that respondent had made "very good progress" and offered that "we're looking at reunification with mom right around the corner." The court released the child to respondent's care in an order entered on the same day.

On March 27, 2014, the Department petitioned to have the minor child removed from respondent's care. In its supplemental petition, the Department alleged that respondent tested positive for cocaine just three days after the child was returned to her care and that she had since missed two drug screens. Respondent did not attend the emergency hearing even though she had notice and the court determined at the hearing that the minor child should remain in protective custody.

In May 2014, the Department again petitioned to have respondent's parental rights to the minor child terminated under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).

The trial court held a review hearing in June 2014. At the hearing, Grider testified that the minor child was adjusting well to his foster home. She stated that respondent had entered a drug treatment program at Pine Rest in Grand Rapids, but gained entry to the program by claiming to be addicted to heroin and the program's services were not adapted to her needs. Her parole officer then helped her get placement into a different program in Kalamazoo. Respondent tested positive for cocaine upon entry to that program and was subsequently removed from the program after she tested positive for benzodiazepine. She then went to jail and after being released went to a third drug treatment program where she again tested positive for cocaine.

The trial court held a new termination hearing in July 2014. Grider testified concerning the events that led to the child's removal from respondent's care in March 2014 and noted that respondent had tested positive for cocaine in March, May, and June. For each incident, Grider related, respondent had an excuse for the positive result or minimized it. She also had numerous instances where she failed to call into the drug screening program or failed to report for testing since March.

Grider testified that the child was "doing fantastic" in his foster placement and would "benefit greatly from stability, knowing what [the] expectations are and rules." Although he absolutely loves his mom, cares about her, and misses her, he "needs [the] stability of knowing I'm gonna come home and I'm gonna eat dinner, and this is gonna be the routine for the day, and I'm gonna have to wake up and go to school, and he knows the routine." Respondent has not shown that she can provide the stability; she has repeatedly sought treatment and then tested positive for cocaine—it's a "constant thing." The child, she stated, is now six and needs to be someplace where he knows things are going to be okay; he needs "a sober caregiver."

Respondent testified at the hearing and said she only tested positive for cocaine on March 20, 2014, as a result of an accident. She explained that she went to a funeral and bummed a "hit" off of someone's cigarette and it was apparently laced with cocaine. As for the positives from the drug treatment program, she denied that they were positive: "I didn't drop dirty for cocaine or benzodiazepine. I don't know what's wrong with their tests, but I asked them to test me again and they wouldn't." Perhaps, she said, the positive results were caused by the tester's use of "[o]ld cups" or her psychiatric medications. After that, she admitted, she had a relapse with cocaine. But the relapse was caused by her inability to deal with the stress caused by her son's removal: "And the only time the drugs started is when he left me."

Respondent maintained that things were now different. She had completed a drug rehabilitation program and the things she learned in the “last 30 days, [she] didn’t learn at all in the last maybe ten or 15 years.” They did not even teach her “the things that a drug rehab taught her” when she was in prison. If the court would just give her one more chance, she stated, she would “not drop dirty at all.”

After the close of proofs, the trial court found that the Department had established each ground for termination by clear and convincing evidence. The court examined all the evidence and found respondent to be an addict who has struggled with her addiction for 27 years. It stated that respondent had received services and yet could not rectify the conditions that led to the minor child’s removal and her continued addiction prevented her from caring for the child and posed harm to the child’s welfare.

Concerning the child’s best interests, the court noted that respondent has an excuse or explanation for every positive or missed screen. While it acknowledged that relapses can happen and should not automatically disqualify a parent, the court stated that respondent had a pattern of relapses and was not honest with herself or her caseworkers. If this case just involved respondent, the court opined, “we could give her all the time in the world.” But the case did not just involve her—it involved a child who was nearing seven years of age, who had lived in various homes, and was still waiting for his mother. The court had no doubt that respondent loved her son and would not purposely harm him, “but the bottom line result is she always chooses drugs over the minor child, and that evidence is—is clear.” Because the child could not continue “languishing in limbo”, the court found that it was in his best interests to terminate respondent’s parental rights.

The trial court entered an order terminating respondent’s parental rights on July 31, 2014. Respondent now appeals by right.

II. TERMINATION OF PARENTAL RIGHTS

A. STANDARD OF REVIEW

Respondent argues on appeal that the trial court erred by terminating her parental rights; specifically, she argues the trial court clearly erred when it found that the Department had established a ground for termination by clear and convincing evidence and clearly erred when it found that termination was in the child’s best interest. This Court reviews for clear error both a trial court’s decision that the Department has proved a ground for termination by clear and convincing evidence “and, where appropriate, the court’s decision regarding the child’s best interest.” *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K).

B. ANALYSIS

In order to terminate respondent’s parental rights, the Department had to establish at least one ground for termination under MCL 712A.19b(3) by clear and convincing evidence. *In re Trejo*, 462 Mich at 355. In this case, the Department argued and presented evidence that respondent’s parental rights should be terminated under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).

Termination is appropriate under § 19b(3)(c) when the parent is a respondent in a proceeding brought under the chapter, 182 or more days have elapsed since the initial dispositional order, and—in relevant part—either the conditions that led to the adjudication continue to exist, or other conditions exist that cause the child to come within the court’s jurisdiction, the parent has received recommendations to rectify those conditions, the parent has not rectified the conditions after a reasonable opportunity and, in for either ground, there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age. See MCL 712A.19b(3)(c)(i) and (c)(ii). Termination is appropriate under § 19b(3)(g) if the parent, “without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.” Similarly, termination is appropriate when there is a “reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.” MCL 712A.19b(3)(j).

The child originally came under the court’s jurisdiction after respondent admitted that she had a drug addiction that prevented her from adequately caring for the minor child. Although there was evidence that respondent had mental health issues, and lacked proper housing and employment, her drug addiction contributed to these problems and remained the primary barrier to reunification.

The evidence showed that respondent had been addicted to cocaine for decades and that it prevented her from raising her three oldest children. Respondent admitted that those children had been raised by their grandmother because she was leading the “street life”; she further admitted that she had supported her addiction through criminal conduct and had done “stints” in prison as a result. Moreover, despite being incarcerated in the past for issues related to her addiction, which prevented her from raising her daughters, respondent invariably relapsed after every period of sobriety. Respondent’s oldest daughter testified that her mother would get clean for a while after being imprisoned, but that it was her habit to return to her old ways sometime after being released. These same issues plagued respondent with regard to the minor child at issue and caused the Department to petition for the removal of the child from her care.

There was evidence that the child was born while respondent was incarcerated. Once released, respondent again used drugs and it was this drug use that led the Department to petition for the child’s removal. After the trial court took jurisdiction over the child, respondent initially failed to participate in the drug screening program or utilize any services. She also failed to attend the first few review hearings. Thus, there was substantial evidence that respondent was at first unwilling or unable to take steps to rectify the conditions that led to the adjudication and that her inability was occasioned by her continued drug use.

After respondent was again charged with crimes committed to support her addiction, she took steps to address her drug use. While in the controlled prison environment, respondent was able to remain clean and sober and participate in services. It was because of her compliance with the case service plan while incarcerated that the trial court initially found that the Department had not established grounds for termination. But the trial court also recognized that it was respondent’s past practice to get sober while incarcerated, but then relapse after her release. Not only was there evidence that respondent had relapsed on prior occasions after leaving prison,

there was troubling indications that respondent did not appreciate the severity of her drug problem, which made it more likely that she would relapse after this most recent incarceration. She testified at the first termination hearing that she had a problem with drugs, but that her addiction did not prevent her from parenting the minor child. This testimony strongly suggested that respondent believed that she could both continue using cocaine and adequately parent the minor child—a belief that was plainly contradicted by her experience. Nevertheless, the trial court decided to err on the side of preserving respondent’s parental rights and gave respondent an opportunity to prove her ability to remain sober and properly care for the minor child outside of prison.

After her release, respondent continued to participate in services for a time, but within days of having the minor child returned to her care, she resumed using cocaine. Her relapse was consistent with her past habit and her stated belief that she did not have to give up using cocaine in order to be an adequate parent. Respondent’s inability to accept the realities occasioned by her drug addiction were also shown by the evidence that she refused to take responsibility for her relapse; she characterized her relapse as an accident, stated her belief that her positives were false, and then blamed her relapse on the stress caused by the Department’s decision to again remove her child from her care.

Respondent’s relapse after being incarcerated and participating in drug treatment services demonstrated that the conditions that led to the initial adjudication remained and that new conditions—namely criminality—had arisen that would give rise to jurisdiction. In addition, respondent’s inability to remain clean and sober when combined with her lack of insight strongly suggested that she would be unable to rectify those conditions within a reasonable time. See MCL 712A.19b(3)(c)(i) and (ii). The same evidence also showed that respondent had not and would not be able to provide proper care or custody for the child within a reasonable time and that there was a risk that the child would be harmed if returned to her care. MCL 712A.19b(3)(g) and (j). As the trial court aptly stated, respondent invariably chose drug use over her child’s needs.

On appeal, respondent argues that the evidence that her “sincere commitment to becoming a better parent” and the efforts that she took to get services established that the trial court was clearly wrong when it found that there were grounds for termination. Despite the evidence that respondent truly loves her son and tried to get help, there was strong evidence that she had repeatedly failed to remain clean and sober, had not benefited from drug treatment, and continued to minimize the severity of her drug problem. It is not enough for a respondent to take steps to get services and desire to improve; the respondent must actually benefit from the services, which the record showed she had not done. See *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). The trial court might have found on the basis of its special opportunity to assess respondent’s credibility that respondent was sincere and would make better use of the opportunity should it give her yet another chance to get clean and sober. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). But the trial court did not find that to be the case; instead, it found that respondent would continue to choose drugs over the needs of her child. Because the record evidence supports that finding, we must defer to the trial court’s superior ability to assess respondent’s credibility on that issue. *Id.*

The trial court did not clearly err when it found that the Department had established each of the grounds for termination by clear and convincing evidence. *In re Trejo*, 462 Mich at 355, 356-357.

Once the trial court found that that the Department had established a ground for termination by clear and convincing evidence, it had to terminate respondent's parental rights if it also found that termination was in the child's best interests. MCL 712A.19b(5). On appeal, respondent argues that the evidence showed that she was bonded to her child and had taken "life-altering steps in order to preserve her place as his mother." The trial court should have accepted this evidence, she maintains, and concluded that termination was not in the child's best interests.

The trial court recognized the bond between respondent and her child and stated its belief that she would not intentionally harm him. But it also recognized that the child had been waiting for his mother to get clean and sober for years and, in the interim, had been languishing in the child protective system. Moreover, the record showed that the child was benefitting from the stability and predictability provided to him by his foster family—a stability and predictability that respondent could not provide. There was also evidence that respondent's continued interactions with the child contributed to the instability of his home environment. On this record, we cannot conclude the trial court clearly erred when it found that termination was in the child's best interests. MCL 712A.19b(5).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ William B. Murphy
/s/ Joel P. Hoekstra